United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

74-1584

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket Nos. 74-1584
74-1636

SCIENTIFIC HOLDING COMPANY, LTD.,

Plaintiff-Appellant,

-against-

PLESSEY INCORPORATED,

Defendant-Appellee.

REPLY BRIEF OF DEFENDANT-APPELLEE IN SUPPORT OF CROSS-APPEAL

ROGERS & WELLS
Attorneys for Defendant-
Appellee Plessey Incorporated
200 Park Avenue
New York, New York 10017
(212) 972-7000

OF COUNSEL:

William F. Koegel
James J. Maloney
John B. Koegel

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ARGUMENT

PLESSEY IS ENTITLED TO JUDGMENT ON ITS COUNTERCLAIM

Plaintiff argues that the jury's verdict denying Plessey's counterclaim must be affirmed because the breaches demonstrated by Plessey through written financial statements prepared by independent accountants in the amount of $106,752 must be reduced by: (1) a $54,000 overstatement of liabilities and (2) by $58,500 because the financial statement delivered by ISL at closing put Plessey on notice that certain items included in its inventory figure might be obsolete and, therefore, their immediate market value was doubtful.

A. ISL's Liabilities

As indicated in Plessey's main brief (pp. 77-78) and as conceded by plaintiff in its reply brief (pp. 18-19), the financial statement delivered by ISL at closing failed to include certain ISL liabilities totaling $33,822. Since the jury found that Plessey relied upon the financial representations in the agreement, including subparagraph 10(d), there is no basis for the jury's finding that that paragraph was not breached.

Plaintiff seeks to avoid this undisputed discrepancy and argues that $54,000 of other liabilities were subsequently

determined to be nonexistent. It is respectfully submitted that the language of subparagraph 10(d) required the inclusion of the liabilities which were omitted and that there is nothing on the face of the agreement which entitles plaintiff to absolve itself from this breach by reason of the fact that certain other liabilities were later determined to be nonexistent.

B. ISL's Inventory

With respect to the inventory breach, plaintiff argues that a footnote in ISL's 1969 financial statement, which was delivered to Plessey at the closing, put it on notice that certain memory cores might be obsolete and, therefore, of doubtful value. Plaintiff seems to go on to construe this footnote as notice to Plessey that the cores did not even exist. Concededly, the footnote might bar Plessey from claiming that it was misled to believe that the memory cores could be sold for the full $65,000 inventory price. That, however, is not the claim Plessey asserts. Albert testified that Plessey intended to use those cores in other operations in other plants for which they were not obsolete. Plaintiff has cited no evidence in the record that as of the date of closing either Albert or anyone else was put on notice by ISL that $58,500 worth of the memory cores did not even exist. Because the jury found that Plessey was relying upon

the financial representations, its further finding that subparagraph 10(g) of the agreement was not breached is directly contrary to the only evidence in the record.

Thus, Plessey respectfully submits that it is entitled to judgment as a matter of law in the amount of $106,752 or if the Court determines that plaintiff is entitled to a credit of $54,000 for the nonexistent liabilities, then Plessey is entitled to judgment in the amount of $52,752. Whether or not plaintiff is entitled to such a credit is for a court and not a jury to determine because there is no contention by either of the parties that the applicable provisions of the agreement are ambigious in any respect. Their construction is, therefore, for the Court and not a jury to determine.

Finally, plaintiff argues that this Court may not enter judgment for Plessey on the counterclaim and may not order a new trial. We believe that Plessey is certainly entitled to a new trial with respect to the counterclaim by reason of this Court's decision in Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970). Moreover, it is respectfully submitted that in the interest of economy with respect to both the Court's time and the litigants' expenses, the entire rule preventing a judgment as a matter of law by this Court should be reconsidered.

The discussion by this Court in the Oliveras decision indicates that the only reason for the rule in the first instance is to prevent a tactical victory at the expense of substantive interests. Thus, the Court expressed concern that a litigant in the trial court could cure a defect when put on notice by a motion for a directed verdict. It would appear that this same salutary purpose could be achieved by remanding for a new trial in those instances where the opposing party claims that he can present such additional evidence to cure the defect. It is respectfully submitted that the entire purpose of the rule is subverted where a litigant can argue as plaintiff does here that substantive interests should be disregarded where the opposing party did not realize its right to judgment as a matter of law at the time of the trial but only after careful evaluation of the entire record and the applicable law.

CONCLUSION

For the foregoing reasons, Plessey respectfully requests that judgment be entered for Plessey on its counterclaim.

Dated: New York, New York
October 4, 1974

Respectfully submitted,

ROGERS & WELLS
Attorneys for Defendant-
Appellee Plessey Incorporated
200 Park Avenue
New York, New York 10017
972-7000 (212)

OF COUNSEL:

William F. Koegel
James J. Maloney
John B. Koegel

COPY RECEIVED (2)
Date: 3/14/74
Time: 1:30 P.M.
Silberfeld, Danziger & Bangser
Attorneys for [illegible]
By: [illegible]